

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

In order to provide a more complete ruling in response to the hearsay objections in Defendant Microsoft's "Notice and Informal Memorandum of Points and Authorities in Support of its Motion to Strike the Written Testimony of John Borthwick," the Court enters the following order to supplement and clarify the oral ruling on the record. For context, it is helpful to note that Mr. Borthwick is the Vice President at America Online Inc. (AOL) Advanced Services. Mr. Borthwick has been offered as a witness by the Plaintiff Litigating States in the remedy hearing being conducted in the above-captioned case.

As stated in the Court's oral ruling, Paragraph 19 and the related exhibit PX 661 concern Compaq's Project Phoenix, a customized "Harry Potter PC." Compaq sent Mr. Borthwick a powerpoint presentation (PX 661) which includes a demonstration of the proposed PC and describes the benefits of the project. Borthwick Direct ¶ 19. In Paragraph 19 of his written direct testimony, Mr. Borthwick relates some of the contents of the powerpoint presentation and describes what Compaq hoped to accomplish with the project. *Id.* Mr. Borthwick further describes his ultimate decision not to pursue the project with Compaq based upon his conclusion

that Project Phoenix “did little more than make superficial changes to the user interface.” *Id.*

In its motion to strike, Microsoft complains that Mr. Borthwick’s testimony in Paragraph 19 relies on the Compaq document, a hearsay document, to prove the truth of the matters asserted therein. Plaintiffs counter this contention with the claim that PX 661 is a business record and, therefore, fits into the hearsay exception provided in Federal Rule of Evidence 803(6).¹

Alternatively, Plaintiffs claim that neither Mr. Borthwick’s testimony nor the document are hearsay as Mr. Borthwick’s testimony expresses only his beliefs and/or viewpoint based upon the document. Thus, argue Plaintiffs, PX 661 is not offered to prove the truth of the matter asserted therein.

At the outset, the Court finds several problems with the proposition that PX 661 should be treated as a business record and, therefore, is admissible pursuant to Federal Rule of Evidence 803(6). As the Court of Appeals has explained with regard to documents offered pursuant to the business records exception:

If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider’s statement must fall within another hearsay

¹Rule 803(6) excludes from the hearsay prohibition set forth in Rule 802:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. 803(6).

exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have.

United States v. Baker, 693 F.2d 183, 188 (D.C. Cir. 1982). There is nothing in the present record that would establish that PX 661 is a Compaq business record. Although the Court can speculate that the powerpoint presentation could have been sent to AOL as a Compaq business record, and in turn, was retained by AOL as a business record, such speculation is not a sufficient basis upon which to deem the document admissible as a business record. Rather, the case record should contain the necessary information to establish that the document was created and maintained as a business record by Compaq. The case record should further reflect that AOL received and maintained the Compaq document as a business record. As noted above, the case record is devoid of any such information. Consequently, the Court cannot consider the Compaq document for the truth of the matters asserted therein. The Court will consider only Mr. Borthwick's conclusion that he was not interested in the Compaq proposal for the reasons he stated.²

Microsoft next argues that Paragraph 22 is a hearsay statement in that Mr. Borthwick recounts that he has had discussions with third parties concerning "creating customized desktop experiences." Borthwick Direct ¶ 22. Mr. Borthwick's testimony does not repeat the discussions with the unnamed third parties. The Court will accept Plaintiffs' explanation that Mr. Borthwick's Paragraph 22 testimony is offered only to establish "the fact that he had discussions

²The Court notes, however, that it appears that the document was offered only to establish that Compaq had shared its "Project Phoenix" proposal with Mr. Borthwick and that, based upon his review of the document, Mr. Borthwick concluded that he was not interested in the project. Thus, establishing that the propositions asserted in the Compaq proposal are "true" does not appear to be the purpose of the document's introduction. As a result, the Court may consider the document for purposes other than to establish the truth of the matters asserted therein.

with such companies.” Pl. Opp’n at 3. As this testimony merely reflects Mr. Borthwick’s personal interactions with other entities and does not recount statements made by those entities, the Court will consider the contents of Paragraph 22 over Microsoft’s objection.

Finally, Microsoft contends that Paragraphs 25 through 28 of Mr. Borthwick’s direct testimony contain inadmissible hearsay. These paragraphs relate to meetings between Mr. Borthwick, on behalf of AOL, and representatives from Dell and Hewlett-Packard during which the Dell and Hewlett-Packard representatives were shown a prototype of a customized desktop. Mr. Borthwick relates that, in response to his presentation of the prototype, Dell and Hewlett-Packard expressed “interest” in the product, Borthwick Direct ¶¶ 25, 28, as well as “frustration,” *id.* ¶ 26 (Dell), and “concerns,” *id.* ¶ 28 (Hewlett-Packard). These third-party expressions are the statements most directly at issue in Defendant’s motion. Plaintiffs argue that these statements are not offered for the truth of the matter but only to provide context for Mr. Borthwick’s belief that OEMs and third parties are interested in providing a customized desktop experience. Pl. Opp’n at 3. In this regard, Plaintiffs point out that statements demonstrating context or belief can be used to explain conduct. *Id.* The fallacy in Plaintiffs’ reliance upon this analytical construct is that third party statements offered to explain Mr. Borthwick’s beliefs or the context in which he was acting are appropriate only if there is a need to explain his conduct. In this case, the conduct at issue is not that of Mr. Borthwick, but of the third parties, the OEMs—most specifically, the OEMs’ interest in a customized user interface. Accordingly, Plaintiffs’ focus upon the context in which Mr. Borthwick was acting is misplaced. In a similar vein, Plaintiffs argue that the prohibition against hearsay does not preclude evidence introduced to show the basis for Mr. Borthwick’s conclusions that “OEM’s and third parties are interested in offering consumers a customized desktop experience.” Pl. Opp’n at 3. Once again, Plaintiffs’ logic fails. The only

reason Plaintiffs want to provide “basis” for Mr. Borthwick’s conclusions is to establish the truth and validity of those conclusions. Just as hearsay evidence of a memory or belief cannot be used to establish the fact remembered or believed, Fed. R. Evid. 803(3), hearsay evidence of the “basis” for Mr. Borthwick’s conclusions cannot be used to establish the validity of those conclusions. *See* Fed. R. Evid. 803(3) advisory committee’s note (“The exclusion of ‘statements of memory or belief to prove the fact remembered or believed’ is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.”). Only where Mr. Borthwick’s actions in response to those conclusions are at issue is it useful to offer evidence showing the basis for those conclusions. Accordingly, the Court concludes that Plaintiffs’ additional argument is unavailing.³

³Upon further review of the statements at issue, the Court notes that there is an argument to be made that the statements of interest and concern by Dell and Hewlett-Packard are admissible pursuant to Rule 803(3) as statements of the then-existing mental conditions of the Dell and Hewlett Packard representatives. Regrettably, Plaintiffs did not offer this exception in their response to Defendant’s objections. Instead, Plaintiffs’ memorandum focuses exclusively upon Mr. Borthwick’s beliefs. Nonetheless, the Court will consider the applicability of this exception. The statements of the representatives from Dell and Hewlett-Packard are admissible to establish that these two OEMs expressed interest in customized versions of Windows. Where such statements include factual assertions that go beyond a statement of mental condition, the statement is not admissible to establish the truth of the factual assertion. Examining Paragraphs 25 through 28, with one notable exception relating to “Microsoft’s response,” Borthwick Direct ¶ 28, it appears that these paragraphs are carefully crafted to avoid factual assertions beyond the mere statement of interest by the OEMs. As a result, these statements are admissible pursuant to Rule 803(3) as reflections of the then-existing mental condition of the representatives of those two OEMs in response to AOL’s presentation. The Court will consider the statements in these paragraphs in this context and will give them the weight the Court deems appropriate. As noted above, however, factual assertions that accompany these third-party statements of interest (for example factual statements regarding Microsoft actions or likely actions) may not be considered for the truth of the matters asserted therein. *See* 30B Michael H. Graham, *Federal Practice and Procedure* § 7044 (Interim Ed. 2000) (explaining that a trier of fact should properly consider

Based on the foregoing, it is this 12th day of April, hereby

ORDERED that the Court's oral ruling regarding Defendant's objections to the hearsay testimony of John Borthwick is SUPPLEMENTED.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

facts attendant to a statement of mental condition only as they bear upon the declarant's state of mind, and not for the truth of the matter asserted by those accompanying facts).